SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 111.

THE UNITED STATES EX REL. EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED,

v.

GEORGE BRUCE CORTELYOU, SECRETARY OF THE UNITED STATES TREASURY.

BRIEF IN BEHALF OF APPELLANT.

Statement.

By virtue of a decree of the Supreme Court of the District of Columbia, on the 7th day of April, A. D. 1905, the appellant duly qualified as executrix of the last will and testament of her father, Joseph W. Parish, deceased, the original claimant of the sum in controversy (Rec., pp. 2 and 15). The retirement of Leslie M. Shaw, the original defendant herein, and the appointment of George B. Cortelyou to be his successor, as Secretary of the Treasury, having been suggested, it was by the court ordered that the said George B. Cortelyou, Secretary of the U. S. Treasury, be made the party appellee in this cause (*id.*, 42).

At the outset the following corrections should be made in the record:

On page 2, 18 lines from the top, the words and figures "at St. Louis, $15.00," should be "at St. Louis, $16.00," as shown by the contract (page 16).

On page 12 the words and figures "5,000 tons of ice at St. Louis, Mo., at $5 per ton, $80,000," should be "5,000 tons of ice at St. Louis, Mo., $16.00 per ton, $80,000."

On the same page, 7 lines from the top, the figures $129,783.33" should be "$129,738.33."

On March 5, 1863, Henry Johnson, medical storekeeper, United States Army, for and on behalf of the United States, and Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., "*for themselves, their heirs, executors, and administrators,*" mutually covenanted and agreed to and with each other for the delivery by said Parish & Co. at Memphis, Nashville, St. Louis, and Cairo of "the whole amount of ice required to be consumed at each respective point during the remainder of the year 1863."

Rates of Payment.

For each ton delivered at Nashville	$25.00
For each ton delivered at St. Louis	16.00
For each ton delivered at Cairo	20.00
For each ton delivered at Memphis	20.00

(Record, p. 16.)

On March 25, 1863, by instruction of Assistant Surgeon General Wood, the following was issued:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, *March* 25, 1863.

"Messrs. J. W. PARISH & Co.

"GENTLEMEN: I am instructed by the Assistant Surgeon General to direct, *that the ice which you have agreed to deliver at the points designated in your contract* shall be distributed in the following quantities, viz:

"At St. Louis	5,000 tons.
"At Cairo	5,000 tons.
"At Memphis	10,000 tons.
"At Nashville	10,000 tons.

"Making *the total of 30,000 which you have contracted to deliver*. The ice to be delivered at Nashville and Memphis is for use of the sick of the armies in the field, and should be furnished *without delay*.

"Very respectfully, your ob't servant,

"By order of the Assistant Surgeon General:

"JOSEPH B. BROWN,
"Surgeon United States Army."

(*Id.*, 2.)

On March 31, 1863, from the same office was sent this order:

"ASSISTANT SURGEON GENERAL'S OFFICE,
"ST. LOUIS, MISSOURI, *March* 31, 1863.

"To J. W. PARISH & Co. (care of C. H. WICKER & Co.), *Chicago, Ill.:*

"I am instructed by the Surgeon General to *suspend* the order I have given you till further instructions are given from him.

"R. C. WOOD,
"Assistant Surgeon General."

The dispatch itself did not reach Parish & Co., but Parish received oral notice of it on April 2. Prior to the notice thus received Parish had delivered 12,768 tons of ice at points named in the contract, and had received therefor the contract price (*id.* 3). To this extent the agreement had been executed. In one week Parish had performed more than one-third of the obligation assumed by him, and had prepared himself to fully execute that remaining to be performed. But the right to recover anything on the last-mentioned account having been disputed, Parish, by virtue of an act of Congress approved May 31, 1872, was empowered to bring suit therefor in the Court of Claims.

Among other findings by the Court of Claims are the following:

FINDING VI.

"Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in Finding V, the

said Parish had purchased for delivery, under the contract sued on, 8100 tons of ice; and after delivery of said letter to him, he set about purchasing ice for delivery, in pursuance of said letter, and thereafter, and before he was on the 2d day of April, 1863, apprised of the aforesaid order of Surgeon General Hammond of March 31, he had purchased, or contracted for the purchase of, 23,000 tons of ice."

FINDING IX.

"The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not, nor did, receive more than the 12,768 tons aforesaid."

FINDING XI.

"The notice of 25th of March, 1863, to the claimants from the Assistant Surgeon General's office at St. Louis, set out in Finding V, and which was suspended by order of the Surgeon General, *remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863*" (*id.*, 3-4).

The record shows the statement of a Government official (*id.*, 2 & 3), that the meltage of the ice furnished by Parish was only about half that of ice furnished by other contractors. The answer admits the statement by the official (*id.*, 29).

Very soon after the contract of March 5, 1863, was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish (*id.*, 18).

The claim made by Parish in the Court of Claims was for the contract price of the ice purchased by him to enable him to discharge his contract, and lost to him by reason of the suspending order of March 31. From the contract price was to be deducted the cost of transportation, not incurred upon the undelivered ice. A majority of the court, speak-

ing through Drake, C. J., held: "The letter of Assistant Surgeon General Wood was no part of the contract, and as the claimant's case rests upon that, their petition must be dismissed" (12 Court of Claims, 620).

In the dissenting opinion of Nott, J., it is said:

"If the Assistant Surgeon General had no authority to order the claimant to deliver this ice *without delay*, as he did, the Surgeon General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so as to keep it in suspense, and at the same time declare that it never had vitality. * * * *That this ice proved a total loss to the contractor, and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial.* * * * *The order to deliver caused him to purchase it; the suspension of the order occasioned its loss*" (*id.*, 622-4).

On appeal, this court reversed the opinion of the court delivered by Drake, C. J., that "the letter of Assistant Surgeon General Wood was no part of the contract"; holding emphatically that it was.

Miller, J., speaking for this court, said:

"The order of the 25th of March, made within 20 days after the contract was signed, was an unequivocal demand, *under that instrument*, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. * * * They were, therefore, under an imperative necessity to prepare to fulfill this requirement."

This court did also adjudge that "to hold the Government to the contract price for all those amounts, they (Parish & Co.) should have delivered, or tendered, or offered to deliver, and demanded payment." But it was added: "As the Government left the demand suspended, so that *while claimants were compelled to purchase under the original orders, and could not safely dispose of it (the ice) while it remained unrevoked*, they are entitled to recover what they paid for the ice which was lost, and what expense they were at in making

the purchase, and in keeping it until it was lost" (*Parish v. U. S.*, 100 *U. S.*, 504-6).

In response to the mandate of this court, the Court of Claims held that it could not reopen the case for additional evidence, but on that before it made a further award of $10,444 91/100.

The claimant therefore applied to Congress for the relief to which this court had adjudged him to be entitled. His claim was referred by the House committee to the War Department for report. The Surgeon General found that the whole amount of undelivered ice, viz., 17,232 tons, was lost to said Parish, and ascertained the cost thereof (Rec., p. 6). On the coming in of this report, by act of Congress of February 20, 1886, it was enacted.

"That the Secretary of the Treasury be and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him *in the purchase of 17,232 tons of ice* for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were *wholly lost to said Parish*" (24 Stat., 653-4).

By this legislative judgment it was finally determined twenty-two years ago, that 17,232 tons of ice (in addition to what had been delivered) had been "wholly lost to said Parish," owing to no fault of his own, but solely by reason of the suspending order. Thereby was conclusively settled between the Government and Parish any ground of defence which could have been brought forward to reduce the sum appropriated in payment therefor, if such existed and had not been brought forward. It was determined that no adequate defence existed to the payment, or any part of the payment, directed to be made. Any inability on the part of Parish to deliver the ice, had he been called upon to do so; any unskilfulness or culpability which might have been

urged against him and was not, is now concluded by the terms of this act; in effect, the satisfaction entered of the final judgment of this court.

As was said by Nott, J., in the Court of Claims:

"The order to deliver caused him to purchase it (the ice); the suspension of the order occasioned its loss" (*id.*, 4).

The power does not exist to reopen what was thus settled first by this court, and afterwards by Congress.

After the time of this act of 1886, committees, both of the Senate and the House, were convinced that at least the equivalent of tender had existed. This court had said: "that as the claimants neither delivered nor offered to deliver the remainder, they cannot recover either the contract price or the profits they might have made if they had done so." If, therefore, this single objection had been removed, by the logic of that decision, Parish & Co. would have been adjudged entitled to "recover either the contract price or the profits they might have made if they had done so."

The committees were of opinion that under the facts disclosed by the record, there was enough to satisfy an equitable construction of the law of tender. They accordingly passed an act, the plain purpose of which was to place Parish in the position he would have occupied had the contract been completed—that is, to give him the same benefits he would have received had he delivered every pound of the 30,000 tons of ice and been paid the contract price therefor. This is the object, intent, and effect of the act. Congress, in effect, directs that the contract be treated as completed, and the question of tender be treated as if a tender had been made in fact. It is immaterial whether this is or is not the affirmance of a correct rule of law. It is the rule laid down by Congress for the case in the hands of the respondent. Finding IX states that Parish "was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract, * * * of which the de-

fendants had notice." This was fortified by the deposition of Robert T. Cramer, acting medical purveyor and disbursing officer in the Medical Department of the Army, who saw Parish in St. Louis the week following the 25th of March. Parish then said: "I have made all my contracts to furnish the 30,000;" and "he wanted me, if I was in communication with my associates, *to urge upon them the importance of securing it as soon as possible;*" he said "that he was prepared to furnish the whole apportionment, 30,000 tons." The testimony of said witness is not contradicted nor impeached (Rec., p. 9). Since then, as the petition shows, the Law Board of the Auditor's Office have given their sanction to the conclusion that Parish *"tendered the whole 30,000 tons"* (*id.*, 13). By the terms of an act of February 17, 1903, the Government intended to estop itself from raising or taking any advantage of any question of failure of tender or offer to deliver, if such existed; and, in addition to the estoppel already existing by reason of the act of February 20, 1886, and also by the judgment of this court, to estop itself once more as to any question of ability to deliver the ice, which in point of fact had not been delivered. The question of tender has been waived or the lack of tender cured by the following act:

"That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish & Company with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which contract bears date March 5th, 1863, and provides that said J. W. Parish & Company should furnish to the United States, for the use of the Medical Department of the Army, the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full, without change or

default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (110 U. S., 338) and in accordance with the evidence of the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish & Co. under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Co. or to said Joseph W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated" (Rec., p. 17).

32 Stat., 1612.

The statement, which the Secretary was authorized and *directed* to make, was by him referred to the proper officer, viz., to the Auditor for the War Department. This officer stated the account as follows:

5,000 tons of ice at St. Louis, Mo., $16.00 per ton		$80,000.00
5,000 tons of ice at Cairo, Ill., $20.00 per ton		100,000.00
10,000 tons of ice at Memphis, Tenn., $20.00 per ton		200,000.00
10,000 tons of ice at Nashville, Tenn., $25.00 per ton		250,000.00
		$630,000.00
From which deduct		
Payment by Medical Department	$129,738.33	
Settlements by Second Comptroller's Office	171,072.69	
Award by Court of Claims	10,444.91	
Amount saved by non-delivered ice	137,385.12	
		448,641.05
Leaving balance due		$181,358.95

Rec., p. 12.

The act directs that the contract shall be treated as completed, not only as if it could have been performed, but as if it had been performed; as if "*the said contract had been carried out in full, without change or default, made by either of the parties thereto.*"

The Secretary is directed to ascertain what would have been the full amount coming to Parish upon such completion of the contract under the rule laid down in the Behan case, and this rule directs the matter to be ascertained to be "*the difference between the cost of doing the work and what he was to receive for it*" (110 U. S., 345). "What he was to receive" was fixed by the contract. With a single exception, "the cost of doing the work" had also been fixed by payments in the nature of satisfied judgments. The single exception was what would have been paid for the transportation of the undelivered ice. This part of "the cost of doing the work," *and this part only*, was to be determined "in accordance with the evidence in the case collected by the United States Court of Claims." The act directs the Secretary (and the direction is mandatory) "*after determining the full amount thus due said J. W. Parish & Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress*, or otherwise." The balance resulting from this deduction (not from any other deduction) was to be paid to Parish, and was by the act expressly appropriated. What the Secretary was directed to ascertain and determine was "the claim of Joseph W. Parish against the United States for *balance*." His examination was limited to this. The word "balance" imports that some payments have been made. To ascertain it, therefore, the aggregate amount due under the contract and the payments made must be known.

The sixteenth paragraph of the petition alleges that "the evidence in the case collected by the United States Court of Claims" gives the exact rates for the transportation of ice,

during the spring and summer of 1863, from Lake Pepin to St. Louis, Cairo, Nashville, and Memphis. It is alleged that this testimony *"received no word of contradiction," and "therefore was conclusively established"* (*id.*, 10).

This showed the rates of transportation of ice during the spring of 1863, by barges:

From Lake Pepin to St. Louis.....	$5.00 per ton
From Lake Pepin to Cairo.....	6.00 per ton
From Lake Pepin to Nashville.....	9.00 per ton
From Cairo to Memphis.....	2.00 per ton

The answer does not deny that this evidence was given; and it does not deny that it was uncontradicted evidence (*id.*, 30). This was therefore *"the evidence in the case collected by the United States Court of Claims,"* upon the only point the Secretary was directed to examine.

This was uncontradicted, and therefore conclusively established proof. The whole case submitted by the reference is stated, in language too clear for cavil by the Law Board of the Auditor's office (in paragraph 19 of the petition):

"Said committees of Congress were evidently satisfied with the evidence as to Mr. Parish's ability to have fulfilled his contract and as to the loss of the ice. * * * This statement is evidenced by the fact that Congress passed the Act of February 17, 1903, directing the Secretary of the Treasury to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., *if the said contract had been carried out in full, without change or default made by either of the parties thereto; in other words, as if Parish had delivered the whole amount of ice contracted for, and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice.* * * * If the evidence in the case collected by the Court of Claims should be examined to ascertain from that source, first, whether or not the contractor had purchased sufficient ice to meet his obligations under his contract; second, whether or not the ice left on his hands had, *in consequence of the refusal to receive it, been lost to him*, it would be found that all these points had been fairly well sustained in the

affirmative by the testimony. * * * That the Court of Claims was justified in making its ninth finding of fact to the effect *that Mr. Parish was prepared* and willing to deliver the 30,000 tons of ice contracted for, in conformity with the conditions of the letter of March 25, 1863, and *that he tendered the whole 30,000 tons*, but that the Government would and did not receive more than 12,768 tons. * * * That under the Act of February 17, 1903, *there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice.*"

Further:

"That the sufficiency *of the evidence to prove the purchase of a single pound of the undelivered ice, between the 25th of March, 1863, and the 2d day of April, 1863, by Joseph W. Parish & Co., or the loss of the same after the 31st of March, 1863, is immaterial* in view of the provisions of the Act of February 17, 1903."

Hence it followed "that after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case *presents simply a mathematical proposition*, under the rule laid down for the measure of damages in the Behan case" (*id.*, 12-13).

Realizing that nothing remained to be performed of the duty confided to him, the Auditor, on August 11th, 1900, wrote:

"To JOSEPH W. PARISH, care of attorney, J. H. MCGOWAN, *Washington, D. C.:*

"The claim filed by you for amount found due under act of Congress, approved Feb. 17, 1903 (Private, No. 469), for ice under contract with J. W. Parish & Co. received in this office April 15, 1903, *has been examined and settled*, as shown in the following statement, and settlement certificate No. 23,729, transmitted to the Secretary of the Treasury for payment.

"Amount claimed. Amount disallowed. Amount allowed.
$181,358.95.

"Respectfully, F. E. RITTMAN,
"*Auditor.*

(*Id.*, 28.)

These are the facts alleged in the petition, which, in conclusion, alleges: "The said Secretary positively refused to pay the balance found by the auditor to be due the said Parish or any part thereof," and asks that a rule be laid on the said defendant, requiring him *to show cause why a writ of mandamus should not be granted.* In accordance therewith a rule was laid on the defendant to show cause why the peremptory writ of mandamus should not be granted (*id.*, 40).

It is confidently asserted that there is not a single allegation of fact in the petition material to the issue which the answer denies or tends or pretends to deny. It is, indeed, asserted that the rights accruing under the contract made by Parish & Huse "for themselves, their executors, and administrators" do not pass to the executrix of Parish, which, of course, will be considered. But, with this exception and with the qualification that respondent claims to be under no obligation to consider the findings of the Court of Claims, *"the said act vesting in defendant the right to review said evidence and make such findings as seem right and proper to him,"* the answer admits, in substance, paragraphs (1) to (13) inclusive of the petition; denies claimant's construction of the act of February 17, 1903, in paragraph (14); denies the claimant's conclusions from the admitted facts stated in paragraphs (15) to (20), inclusive, and denies the legal conclusions stated in paragraphs (20) and (21) of the petition.

The answer admits the quotations from the report of the Law Board, but alleges that on the 26th day of January, 1904, the said auditor "revised his said statement and found that nothing was due." It is further said that respondent, on August 12, 1903, referred said account to the Comptroller of the Treasury, and on the 21st of January, 1904, said Comptroller advised defendant "that in his opinion nothing was due to said Parish under said act of February 17, 1903, and revised said account, and that on the 26th day of Janu-

ary, 1904, *pursuant to said revision of said Comptroller*, said auditor cancelled the certificate theretofore made by him" (*id.*, 31). The Solicitor of the Treasury advised to the same effect (*id.*) The convincing reasons supplied by these officials are not given. We are left to infer that it was exclusively "*pursuant to said revision of said Comptroller* said auditor cancelled the certificate theretofore made by him," thus making a *tabula rasa* of his own arithmetic.

The reasons of the respondent's determinations, as stated in the answer, are given in a paper filed as "Exhibit A" thereto. It may be this paper gives the reasons supplied by the two officials on whom reliance was placed. These reasons will receive a careful consideration.

The cause coming on to be heard in the trial court upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibit, and affidavit, and the demurrer to said answer, the prayers of said petition were denied and the rule to show cause discharged (*id.*, 40). On appeal to the Court of Appeals of the District said judgment was affirmed (*id.*, 42-50). To correct the error of the court last mentioned the present writ of error to remove the cause to this court issued (*id.*, 51-53).

Assignments of Error.

The Court of Appeals erred:

(1) In not sustaining the demurrer to the return.

(2) In denying the prayers of the petition.

(3) In holding that the return was sufficient.

(4) In sustaining the position of the respondent that the direction to "ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full, without change or default, made by

either of the parties thereto" was, in effect, contradicted by specific instruction in the same sentence to do this under the rule "laid down by the Supreme Court in the case of *United States v. Behan.*"

(5) In sustaining the position that respondent was vested with a paramount power to make new findings for himself in respect to matters in which he was concluded by the findings already made in the Court of Claims, and notwithstanding the fact that the committees of the Senate and the House make the 9th finding by said court the basis of the bill, which by the unanimous voice of both Houses became, when approved by the President, the act of February 17, 1903.

(6) In holding that the careful consideration and well-reasoned conclusions of the committees which reported the bill, were not a proper source of enlightenment as to any doubt which might exist respecting the intent of the act into which the bill, so reported, ripened.

(7) In holding that the Secretary of the Treasury had discretion given him (more than forty years after the event) to decide that Parish could not have delivered the ice, if called upon to do so, notwithstanding the 9th finding—"*The said Parish was prepared and willing to deliver the said 30,000 tons of ice, in conformity with the conditions and obligations of this said contract, and the terms of said letter of March 25, 1863.*"

(8) In holding, in effect, that the act of February 17, 1903, gave the Secretary a discretion to correct the judgment of this court in 100 U. S., 500, and the appropriation by Congress pursuant thereto; as well as to set aside and for nothing hold the explicit directions of the very act under which the Secretary avowedly was acting.

(9) In sustaining the position of the respondent, that the profits to be ascertained, by the application of the rule in the Behan case, were remote and speculative in character, "and therefore incapable of that clear and direct proof which the law requires."

(10) In holding that the duty imposed on the respondent was a judicial and not a ministerial duty.

(11) In holding, in effect, that the unofficial duties imposed by special act upon the Secretary, viz., "the plain duty of ascertaining a balance due Parish by mere computation, on plain lines laid down for his guidance," like his official duties, were subject to official (or quasi official) discretion, beyond the power of courts to control.

(12) In holding that the Secretary, after the balance due to Parish under the act, by "mere computation on plain lines laid down for his guidance" had been irrefutably ascertained by his own right hand (the proper accounting officer), was justified in refusing to further perform the requirement of said act, by paying over to Parish the balance, so ascertained; because of a supposed power in the Secretary, in contravention of the express language of the act of February 17, 1903, and of prior legislation and adjudication, to decide that Parish could not have transported the ice, if called upon to do so.

Points and Authorities.

I.

Analysis of the Case.

The record of the case upon which the writ of mandamus is asked discloses the following state of facts in the order of their event:

First. By contract of March 5, 1863, Parish & Company agreed and undertook to deliver "the whole amount of ice required to be consumed at Memphis, Tennessee, Nashville, Tennessee, St. Louis, Missouri, and Cairo, Illinois, during the remainder of the year 1863," the United States agreeing to pay for the ice delivered at Nashville $25 per ton; at St. Louis, $16 per ton; at Cairo, $20 per ton, and at Memphis, $20 per ton (Record, p. 16).

Second. By instructions from the United States, the ice contracted for was to be distributed as follows, viz: At St. Louis, 5,000 tons; at Cairo, 5,000 tons; at Memphis, 10,000 tons, and at Nashville, 10,000 tons (Record, p. 2).

Third. Before the 2d of April, 1863, Parish & Company had delivered, under the contract and instructions, ice in the places and quantities following, viz: At St. Louis, 4,174 tons; at Cairo, 1,388 tons; at Memphis, 6,456 tons, and at Nashville, 750 tons, for which they were paid $242,414 (Record, p. 3).

Fourth. On March 31, 1863, the United States suspended the order and instruction given for the delivery and distribution of the ice, under the contract, by a letter of that date from the Assistant Surgeon General's Office, "till further instructions are given by him," but the notice did not reach Parish until April 2, 1863 (Record, p. 3).

Fifth. On May 30, 1872, Congress, by an act duly approved, directed the Court of Claims to hear and determine the claim, and that court did render a judgment from which an appeal was taken to the Supreme Court of the United States, where the judgment of the Court of Claims was reversed (Parish *v.* U. S., 100 U. S., 500).

Sixth. The case was remanded to the Court of Claims, and that court gave judgment for the sum of $10,444.91, which was duly paid by the United States (16 Court of Claims R., p. 642).

Seventh. Claimant again applied to Congress for relief from the action of the Court of Claims in refusing to hear the testimony tendered by him, and Congress referred the case to the War Department for a report on the facts, and the amount which should, upon those facts, be paid to claimant. The War Department reported that upon the evidence "Parish was entitled to be reimbursed on account of the cost of ice not delivered" the sum of $58,341.85. On February 20, 1886, Congress enacted "That the Secretary of the Treasury be, and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury not otherwise appropriated, the sum of $58,341.85 *being the balance of money laid out and expended by him in the purchase of 12,252 tons of ice, for the use and at the request of the United States, which were not afterward called for or taken by the Government, but were wholly lost to said Parish*" (24 Statutes, 653-4).

Eighth. The three payments so made by the United States to Parish of the said sums of $242,444.00 and $10,444.91 and $58,341.85 were made to reimburse him the amounts he had actually expended in the purchase and transportation of the ice, but they were not made to compensate him for the purchase and delivery of the ice under his contract.

Ninth. Parish then applied to Congress to provide for the compensation to which he was entitled under the terms of his contract with the United States, and Congress passed the act of February 17, 1903, for the purpose of having ascertained and of paying to him the amount of the compensation to which he was entitled (32 St., 1012).

Tenth. The act of February 17, 1903, directed the Secretary of the Treasury "to make full and complete examination into the claim of Joseph W. Parish against the United States for the balance alleged to be due him," and

> "1. determine and ascertain the full amount which should have been paid said J. W. Parish & Co. if the said contract had been carried out in full without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States v. Behan, 110 U. S., 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and, after determining the full amount thus due said Parish & Co., under said contract, and rule of law aforesaid,
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> "2. to deduct therefrom all payments which have been made to said J. W. Parish & Co., or to said J. W. Parish, whether in pursuance of judgments of the court, or direct appropriation by Congress or otherwise, stating what balance, if any, is due under the rule and evidence presented herein, and
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> "3. pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated."

Eleventh. Under the direction of said act, the Secretary of the Treasury did place in the hands of the Auditor for the War Department, in the Treasury, the said act of Congress, the case of United States *v.* Behan, and all the evidence collected in the Court of Claims, and instruct said Auditor to ascertain what balance, if any, was due to the said Parish under the contract in accordance with the rule of law and evidence so collected.

Twelfth. The said Auditor, in pursuance of the instructions so received, did ascertain such balance, and did report the same, together with the process of calculation by which it was ascertained, to the Secretary of the Treasury, as follows, viz:

5,000 tons of ice at St. Louis, at $16 per ton..		$80,000.00
5,000 tons of ice at Cairo, Ill., at $20 per ton.		100,000.00
10,000 tons of ice at Memphis, at $20 per ton		200,000.00
10,000 tons of ice at Nashville, at $25 per ton		250,000.00
		$630,000.00
Brought forward		$630,000.00
Deduct payment by Medical Department	$129,7[illegible].00	
Settlement by 2d Comptroller office	171,072.69	
Award by Court of Claims....	10,444.91	
Am't saved by non-delivered ice	137,385.12	
		448,641.05
Leaving balance due.....		$181,358.95

Record, p. 12.

Thirteenth. On August 11, 1903, the said Auditor sent to Parish a formal notice that said balance had been allowed (Record, p. 13).

Fourteenth. On June 2, 1906, the Secretary of the Treasury filed his report made under said act of February 17, 1903, in which, after alleging the existence of several matters, the contrary of which had been expressly adjudged by the Supreme Court in Parish *v.* United States, 100 U. S., 500, he concludes his report as follows, viz: "Counsel for claimants now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act*. I reach the conclusion that nothing is due" (Record, p. 37).

The question presented here is, Why, if the amount ascertained by the Auditor is "conceded to be due, if anything, under the act," did the Secretary of the Treasury conclude that nothing was due?

Did the act of Congress clothe the Secretary with power to conclude that nothing was due, if under the rule of damages prescribed by Congress, and under the evidence collected in the Court of Claims, it is mathematically certain that something was due, as was ascertained by the Auditor?

It is undoubtedly true that the United States Government is not bound by the decisions of their accounting officers.

Nutt *v.* United States, 125 U. S., 624.

U. S. *v.* Harman, 117 U. S., 65.

But when the amounts ascertained by such officers are conceded by the head of the department "to be due, if anything, under the act," is anything left but the performance of the duty imposed by Congress?

II.

In performing the duty laid upon him by the act of February 17, 1903, the Secretary of the Treasury was not acting in the exercise of judicial or discretionary but only of ministerial powers.

The "nature of the thing to be done" by him did not admit of the exercise of judgment and discretion.

The Secretary says, in the second paragraph of his return to the alternative writ (Record, p. 31), that he was "acting in his official capacity as Secretary of the Treasury," and, in the same return (page 32), that he was acting "in the exercise of the judgment and discretion conferred upon him by the said act of Congress."

Now, it may be conceded here that if this act of Congress, in its requirements, called for the exercise of judgment and discretion by the Secretary the peremptory writ should not be granted.

By what rule or test may it be determined whether one acting under such powers and duties as this act imposes is acting ministerially or judicially?

In Marbury *v.* Madison, 1 Cranch., p. 70, Marshall, C. J., said:

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation. But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore in law is never presumed to have forbidden, as for example, to record a commission or a patent for

land which has received all the legal solemnities, or to give a copy of such record in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment, that right may be done to an injured individual, than if the services were to be performed by a person not the head of a department."

We are admonished, then, that it is by "the nature of the thing to be done," and not by the office of him to whom the writ is directed, that the right to the writ of mandamus is to be determined. Nor is that right to be determined by the mere forms of expression in which the power or duty is laid: for if Congress should direct the head of a department, "in the exercise of judgment and discretion," to add up a column of figures and report the sum, the language employed in the act could not be construed as conferring a power or duty which was manifestly repugnant to "the nature of the thing to be done."

In Kendall *v.* United States, 12 Peters, 524, Mr. Justice Thompson, delivering the opinion of the court, said:

"There are certain political duties imposed upon many officers in the executive departments, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution, and in such cases the duty and responsibility grow out of, and are subject to the control of the law, and not to the direction of the President, and this is emphatically the case where the duty imposed is of a mere ministerial character."

In United States *v.* Black, 128 U. S., 48, this court said:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in any case at all, or when by special statute, or otherwise, a mere minis-

terial duty is imposed upon them, that is a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

In the present case does the act of Congress clothe the Secretary with that "judgment and discretion" which cannot be reviewed by the courts, and in the exercise of which he may, if he will, reject or ignore conclusions which are mathematically demonstrable?

Judge Cooley, on page 515 of his work on Taxation, says of the writ of mandamus:

"It will not only lie, therefore, to compel an auditing board to proceed to the consideration of an account, and to pass upon it in some manner, but if the charges are legal, and it is the clear duty of the board, under the statute to make the allowance, that duty the members may be compelled to perform by means of this writ."

And among many cases cited in the notes in support of this there is cited the case of *People v. Supervisors of Otsego*, 51 N. Y., 401, which is strikingly apposite here. The court said:

"They (the supervisors) are to determine the facts as to any disputed claim, and, if it is unliquidated, they are to determine the amount to be paid. But the law is supposed to be plain, and they are presumed to understand it, and they have no right to reject a claim as illegal, which the law plainly requires them to allow. If they do they can be compelled to the allowance by mandamus."

There are many and important duties laid upon the head of an executive department of the Government which pertain to the office itself and cannot properly be discharged by any other department. Such are the duties which the head of the department performs, as Mr. Shaw says "in his official capacity as Secretary of the Treasury." The performance of such duties is confided to the judgment and discretion of the Secretary. But

there is also a large class of cases in which the Government or the public have no direct concern, to which Judge Marshall referred as cases "affecting the absolute rights of individuals in the performance of which he (the Secretary) is not placed under the particular direction of the President," and which are also referred to in the case of Butterworth *v.* Hoe, 112 U. S., 57, where it is said:

"It is a maxim of the law, admitting of few, if any exceptions, that every duty laid upon a public officer, for the benefit of a private person, is enforceable by judicial process."

In such cases the officer is not performing "official duties," is not acting in an "official capacity," but is discharging only such duties as might with equal propriety have been laid by Congress upon any other official or employee in the service of the Government.

This court has, in many cases strikingly like the case at bar in its distinguishing characteristics, held that heads of departments, as well as other high officials of the Government, when called on by Congress to ascertain balances or determine the amounts due by the Government on claims, were not acting judicially or in the exercise of discretion, but were in all such cases acting only ministerially, and that their findings did not at all bind the Government.

III.

The Court of Appeals, in support of the position that the act of February 17, 1903, vested the respondent with a discretion, the exercise of which the courts cannot control, refer to the case of *Riverside Oil Company v. Hitchcock,* 190 U. S., 316. The opinion in this case rests upon the same ground with that in *United States v. Black,* 128 U. S., 40. The syllabus is, "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, *a special tribunal with judicial functions* to which

is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands, and neither an injunction nor mandamus will lie against an officer of the Land Department to control him *in discharging an official duty* which requires the exercise of his judgment and discretion."

There the mandamus was to compel the Secretary of the Interior to vacate an order rejecting selections of land. The defendant answered that an allegation showing the land selected to be non-mineral in character and unoccupied was an essential averment; that no evidence as to non-occupancy was given; that the affidavit as to the character of the lands was made "upon the evidence found upon the surface of the ground and that the affiant does not undertake to express any opinion as to what may be under the ground;" that in the exercise of his proper duty and function as Secretary of the Interior, the defendant decided that, by reason of the failure of Clarke to show in due and proper form that the lands were at the date of selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected." This court held:

"The *official duties* of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. * * * The court has no general supervisory power over the officers of the Land Department, by which to control their jurisdiction. * * * Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter *which the law gave him the power and imposed upon him the duty to decide for himself*" (190 U. S., 324-325).

The doctrine laid down in *Martin v. Mott*, 12 Wheat., 31, that "whenever a statute gives a discretionary power to any to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts," is not controverted.

But not one word of these opinions militates against, or was intended to erase, one iota of the memorable language in *Marbury v. Madison:*

*"But when the legislature proceeds to impose on that officer (i. e., executive officer) other duties, when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent upon the performance of those acts; he is so far an officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others. * * * Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured has a right to resort to the laws of his country for a remedy"* (1 Cranch., 165, 166, 170, 171).

In *Kendall v. United States*, the court said:

"It has been considered by the counsel on the part of the Postmaster General, that this is a proceeding against him to enforce the performance of an official duty. * * * The mandamus does not seek to direct or control the Postmaster General in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act. * * * This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act" (12 Pet., 609-614).

There is nothing in the act of February 17, 1903, which makes the Secretary *"the sole and exclusive judge of the existence of the facts"* he is directed to ascertain.

In the case at bar, the balance directed to be ascertained has been ascertained. The said balance is produced by strict adherence to the act. That which Congress directed

to be done has been done. The literal compliance with the words of the act is not controverted. On the contrary it is conceded to be correct. The record shows to the court the process by which was reached the balance of $181,358.95, "which is the amount conceded to be due, if anything, under the act." The court has before it the complete ascertainment of that which Congress directed to be ascertained. By a simple act of perception the court can see that everything Congress directed to be done in the way of ascertaining "the said balance" is shown by the record to have been done. The proof before the court is as perfect, as if the Secretary in his return, had produced an account identical with that of the auditor, and then added:

"While this is the undoubted arithmetical result, I decline to 'pay the said balance to said Joseph W. Parish,' the only thing remaining to be done; because I cannot give my assent to the basis upon which rests former judicial action and legislative appropriation.' What remains to be done is as 'purely ministerial' as in the Kendall case. No more in this case than in that. Can the respondent's refusal to act be justified by *'a legal right to do it or not to do it according to his will.'*"

The respondent says that he, *acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged,* * * * and in the exercise of the *judgment and discretion* conferred upon him by said act of Congress did on the 31st of May, 1904, determine, &c." (*id.*, 31-32).

The question before the court would be one of far-reaching consequence, had it not already been decided. Can an executive officer of the Government, by merely saying: "I am acting in my official capacity," change "the nature of the thing to be done" in the execution of a specific duty under a special act, having no relation to his official duty? Further, where the absolute right of an individual is af-

fected by the performance of the specific duty can he, by merely asserting the immunity of official discretion, be suffered (in the words of Marshall) "to sport away" not only the rights of such individual but also "to sport away" the adjudged basis on which they rest?

IV.

The basis of the respondent's reasons for annulling the auditor's clear statement is adopted by the Court of Appeals as a ground for affirmance of the judgment of the trial court, discharging the rule and dismissing the petition.

The greater part of the opinion of the learned Court of Appeals consists in a statement of the case. After reciting the rule in the Behan case, that court concludes:

"Having prescribed this as the applicable rule, the next direction was to apply it, not to the facts recited in the report, *or to the findings of fact by the Court of Claims*, but to the evidence in the case collected by the United States Court of Claims. What this evidence was as a whole we are not advised. The Secretary says of it in his decision: 'The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters.' His general conclusion from the whole of it is *that it does not show that Parish was ready to deliver and could have made delivery of the whole of the ice if the suspension of the contract had been recalled, and that the payments heretofore made to him exceed the loss which he actually sustained. He was commanded to consider the evidence, to apply the rule of law to it, and to render a decision. This involved the exercise of some discretion, and whether or not he erred in his decision is a matter which the courts have no right to determine. They are vested with no power of review*" (Rec., p. 50).

If such a power was really bes[illegible]ed there can be no doubt that "*this involved the exercise [illegible] some discretion*," since it involved a discretion to nullify a judgment of the court of last resort, rendered in the year 1879.

The measure of damages in the case of a contract which has been broken is "the difference between the cost of doing the work and what he (the injured party) was to receive for it (110 U. S., 345)—*i. e.*, what he would have received if the contract had not been broken. When, therefore, the respondent says (what, in effect, the Court of Appeals adopts): "It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only when a vendee makes default, if the contract is to be construed, as though no default had been made," the quarrel is with the rule. If the rule is not *per se* "idle and misleading" in every case to which it has been, or may be, applied, it is not "idle and misleading" as directed to be applied in the case at bar.

V.

A ministerial duty is one to be performed or exercised in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and irrespective of the judgment of him on whom the duty is imposed as to the propriety of the performance.

A ministerial duty "is a simple definite duty arising under circumstances, *admitted or proved to exist*, and imposed by law" (*State v. Johnson*, 1 Wall., 198).

Even where the office itself is judicial, a special duty may be imposed which is ministerial (*Ex parte Vandee*, 49 Ala., 399).

"It has been argued that the law does not require the court to build such bridge or causeway unless it is necessary, &c.; that this inquiry and decision imply a discretion in the court. * * * But if this doctrine were true to the extent contended for in this case, then there is an end to the remedy by mandamus, *for no case can be imagined where a court, a corporation or an individual can be called upon, on the happening of any event whatever, to perform an act in which the body or person so called upon has not the right to*

inquire whether the event has happened and whether under the circumstances of the case he or it is bound to perform the act."

Commonwealth v. Justices of Fairfax County, 2 Virginia Cases, 9.

The act is none the less ministerial, because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts v. Dimon*, 3 Conn. 107, * * *Hosmer, C. J., in delivering the opinion of the court, said:

"Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

Flournoy v. City, 17 Ind., 174.

A statute of Illinois enacted, that in counties owing debts in excess of revenue, the board of supervisors "*may, if deemed advisable*, levy a special tax, &c."

By the Court: "Great stress is laid by the learned counsel upon the language, 'May if deemed advisable,' which accompanies the grant of power. * * * Whenever the public interest or individual rights call for its exercise, the language used *though permissive in form is in fact peremptory*. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. * * * In all such cases, it is held *that the intent of the legislature, which is the test, was not to invest a mere discretion but to impose a positive and absolute duty.*"

Supervisors v. United States, 4 Wall., 435.

Gordon, as personal representative of Fisher, presented a claim against the Government. It had been before several departments of the Government, and allowances had been made which were not satisfactory. On the 3d of June, 1858, a joint resolution was passed directing the Secretary of War "to proceed *de novo* to execute the act and its supplement

according to their plain and obvious meaning, but to deduct from any amount which might be found *justly and equitably due* to the claimants, all sums which had been previously paid." On the 1st of June, 1860, another joint resolution was passed, directing the Secretary of War to restate and resettle the account, and make "such further allowances, if any, as in his opinion justice to the claimants should require." On the 2d of March, 1861, this resolution was, by another joint resolution, rescinded. The question came before this court, as to the nature of the power, with which the Secretary of War was invested. The answer was:

"The Secretary of War acted *ministerially*. The resolution conferred no judicial power upon him."
Gordon v. United States, 7 Wall., 194.

On a parity with the Gordon case is the case of *Chorpenning v. The United States*. Here it was enacted that the Postmaster General be and he is hereby directed, to adjust and settle the claim of said Chorpenning, as surviving partner of Woodward & Chorpenning in his own right for carrying the mails by San Pedro, and for supplying post-office in Carson's Valley, &c.; and (section 2) required to adjust and settle the claim of said Chorpenning, as surviving partner of Woodward & Chorpenning's contract for carrying, &c. (3 Court of Claims, 144). This court said:

"The duty devolved upon the Postmaster General was wholly ministerial and in no sense judicial" (94 U. S., 399).

A judgment of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, awarded a writ of mandamus to compel the Treasurer of the United States to pay to Mary A. Valentine as assignee a residue of 2-35 per cent. interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to the provisions of section 6 of the act approved June 20, 1874, entitled, "An act," &c. One Evans, who, prior to 1874, had

engaged in laying pavements in Washington city, presented his claims therefor to said board. The board executed two certificates bearing date August 1st, 1874, one of which acknowledged an indebtedness of $19,616.25, and the other $909.40, to Evans. A claim having been set up against Evans for repairs, the board delivered the certificates to the Commissioners of the District, who held them as collateral security for any liability of Evans, until June, 1890. The claim for which they were held afterwards appeared to be not well founded. By reason of the refusal to deliver the certificates, Evans was unable to avail himself of the right under the act of 1874 to exchange the same for the 3.65 bonds mentioned in that act; and also to avail himself of the provisions of section 9 of the act of June 16, 1880, providing for the redemption of the said certificates. An action was brought in the Court of Claims to recover judgment against the District of Columbia upon those certificates.

The first section of an act of August 13, 1894, reads as follows:

"That the Treasurer of the United States is hereby directed to pay to the owners, holders, or assignees of all board of audit certificates redeemed by him under the act approved June 16, 1880, the residue of 2.35 100 per cent. per annum of unpaid legal interest due upon said certificates from their date up to the date of approval of said act providing for their redemption."

The relator, by her attorney, made demand for payments of such balance upon the Treasurer, who refused, giving as reason, in a note to counsel:

"The act referred to provides for additional interest to be paid only upon board of audit certificates redeemed by the Treasurer under the act of June 16, 1880. Neither of the certificates recited in your petition was redeemed by the Treasurer, and they are not in his possession. You state that certain judgments of the Court of Claims were issued in lieu of these certificates. These judgments were paid by this office in the manner prescribed by law, but neither of them

states that they were issued in lieu of or upon debts of the District of Columbia, represented by board of audit certificates. The Treasurer has therefore no authority to pay the additional interest you demand."

(In the case at bar, the learned Court of Appeals, speaking of the act of February 17, 1903, says: "That it is ambiguous is well demonstrated by the radically different views of its meaning taken by the claimant and by the Secretary, whose perfect good faith must be presumed" (Rec., p. 49). But "the radically different views" of the meaning of another act, taken by the claimant and by the Treasurer, "whose perfect good faith must be presumed," did not convince that court, nor this, of ambiguity in the act.)

As to the ground taken in the note to counsel, and the return to the petition, this court, speaking through Mr. Justice Peckham, said:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers

of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon a construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required. In this case we think the proper construction of the statute was clear, and the duty of the treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand."

Roberts v. United States, 176 U. S., 223, 230, 231.

In the case of *Kendall v. United States*, it is true, the duty of adjusting the accounts of Wm. B. Stokes and others was devolved upon the Solicitor of the Treasury. That officer was "for this purpose to inquire into and determine the equity of the claims of them or any of them, * * * and to make such allowances therefor, as upon a full examination of all the evidence, may seem right, *according to the principles of equity.*" It was enacted "that the said Postmaster General be, and he is hereby, directed to credit such mail contractors with whatever sum or sums of money, *if any*, the said Solicitor shall *so* decide to be due to them for or on account of any such service or contract," &c. The word "*so*" was construed by counsel for the Government to mean "*according to the principles of equity*," in which case only was the Postmaster General to pay. It was, they claimed, clearly the duty of the Solicitor to confine his allowances within the authority conferred on him by the law, and, if so, it was as clearly incumbent on some one, before the credit was given and the money drawn out of the Treasury, to see that the allowances did not extend beyond the law. Who was to do this? In the first instance, at least, the Postmaster General" (12 Pet., 593-4).

The court said:

"The act required by the law to be done by the Postmaster General is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster had no

discretion whatever. The law upon its face shows the existence of accounts between the relators and the Post-Office Department. * * * There is no room for the exercise of any discretion" (*id.*, 614-615).

"We all agree," said Taney, C. J., "that no discretionary power in relation to the award was given to the Postmaster General; and that the duty enjoined upon him was merely ministerial" (*id.*, 626).

In the Circuit Court of the District of Columbia, Cranch, C. J., said as to the same contention:

"As to the first branch of this argument, we apprehend that the discretion which will justify a party in refusing to do an act must be *a legal right to do or not to do it according to his will.* * * * The Postmaster General seems to admit that, if the law directed the payment of a certain sum, he would have had no discretion; but *id certum est quod certum reddi potest.* * * * The discretion which is claimed by the Postmaster General is no other than that discretion which every man has in regard to his own actions. * * * but he acts at his peril; if correctly, he is justified; if erroneously, he must abide the consequences" (5 Cranch, C. Ct., 238-240).

It is easy to show the correctness of the auditor's statement as to the sums paid for the ice which was delivered by a simple multiplication of the tons delivered at each point by the contract price for ice delivered at that point. "The whole amount of ice which was received by the officers of the Government under said contract, *omitting fractions*," is shown on page 3, the contract price on page 16. Multiplying the former by the latter, we have the following results:

Delivered at St. Louis.....	4,174 tons
Contract price.....	$16 per ton
	25,044
	4,174
	$66,784

Delivered at Cairo	1,388 tons
Contract price	$20
	$27,760
Delivered at Memphis	6,456 tons
Contract price	$20
	$129,120
Delivered at Nashville	750 tons
Contract price	$25
	3,750
	1,500
	$18,750
St. Louis	$66,784.00
Cairo	27,760.00
Nashville	18,750.00
Memphis	129,120.00
Total	$242,414.00
Allowed by Court of Claims	10,444.91
	$252,858.91

$252,858.91
58,341.85 paid under act of February 20, 1886.

$311,200.76

By subtraction of the sums delivered from the sums contracted to be delivered we have the number of tons of undelivered ice as follows:

St. Louis.	Cairo.	Memphis.	Nashville.
5,000	5,000	10,000	10,000
4,174	1,388	6,456	750
826	3,612	3,544	9,250

Multiplying by cost of transportation (Rec., p. 10) we have sum saved on undelivered ice:

St. Louis.	Cairo.	Memphis	Nashville.
826	3,612	3,544	9,250
5	6	8	9
4,130	21,672	28,352	83,250

Nashville	$83,250
Memphis	28,352
Cairo	21,672
St. Louis	4,130
Total	$137,404

The sum found by the auditor as amount saved on undelivered ice is $137,385.12. It will be seen by substraction 137,404—137,385.12 = 18.88, that the sum found by the auditor is $18.88 less than the above computation. Adding the sum found by the auditor to the aggregate of payments we have

$311,200.76
137,385.12
$448,585.88

This is less than the sum found by the auditor, viz:

$448,641.05
448,585.88
55.17

Inasmuch as the number of tons stated in the seventh finding (Rec. p. 3) is stated as the number, "*omitting fractions*," this may account for a difference so small as to be negligible, especially as the Secretary does not animadvert upon any inaccuracy in the auditor's arithmetic. There is no reason to doubt that it is correct to the fraction of a cent. Hence the court can see that the duty imposed upon the Sec-

retary was not only one (in the words of 4 Wallace, 448) "arising under circumstances, admitted or proved to exist, but under circumstances, *admitted and proved to* exist, since the respondent admits that the sum of $181,358.95 "*is the amount conceded to be due, if anything, under the act*" (Rec., p. 37).

VI.

The Test of Sufficiency or Insufficiency of the Return.

"The return to an alternative writ of mandamus is demurrable unless it shows a right to refuse obedience, and it must state the facts which justify such refusal *clearly, specifically, and with such certainty that the court can see at once, that if admitted or established, they furnish a legal alternative for obedience to the writ. The assertion or denial of a legal conclusion without showing the facts which support or forbid such conclusion means nothing; a demurrer to such a pleading must always be sustained. If any pleading misstates the effect of a statute the adverse party in demurring does not admit the correctness of the construction claimed.*"

Woodruff v. R. R. Co., 59 Conn., 65.

"An argumentative denial is no denial" (*id.*, 89).

The language of 59 Conn., 89, may be applied to the so-called denials in the answer: "As denials they are insufficient. Neither of them denies any fact directly." The demurrer does not admit what is not asserted with sufficient certainty, so as to be the basis of judicial action (*Commonwealth v. Armstrong*, 37 Pa. Stat., 289). The facts relied on for justification "should be set out so that the court may judge of their sufficiency" (*Harwood v. Marshall*, 10 Md., 464). The facts, if there be such, to justify the respondent, in respect to the pivotal point submitted, viz., the cost of transportation, are not set out at all in the way of denial of what is alleged in the petition, so that there is nothing before the court upon this subject save what is alleged in the petition.

"The facts relied on to justify the refusal to obey the writ must be clearly and specifically set forth with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as an alternative for obedience to the writ. * * * *Facts, the predicate of conclusions, must be set forth, and not the conclusions merely.*"

Commonwealth v. Armstrong, 37 Pa. St., 279-289.

The reasons for non-compliance returned by the respondent, do not relate to the sole question he was directed to examine, viz., the cost of transportation saved on the undelivered ice, which, in addition to the sums already received, should be deducted from the contract price in order to ascertain the "*balance.*" The reasons relate to matters which were not referred to respondent, and which, by no intendment could have been referred to him. The reasons do not once question the Auditor's arithmetic. It is conceded that if anything is due, the balance found by the Auditor is due. The reasons essay to call in question former adjudications and settlements by this court and Congress; *and by assault upon conclusions which are res judicata between the Government and Parish, to redress what is considered overpayment formerly by non-payment now.*

In the case at bar (as will be more fully shown hereafter), the facts which demonstrate that every prerequisite had been fully complied with for the payment of the balance found due said Parish, and for which the said Act of February 17, 1903, expressly appropriates "sufficient money," are either expressly admitted, or, in consequence of the absence of denial, are by implication admitted.

"A writ of mandamus is not to be answered by a frivolous, evasive, or uncertain return; nor can it be answered by any legal inferences of the defendants from facts not stated. *The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.* * * * The seventeenth averment of the return, in which the defendants allege that they cannot conscientiously levy a tax, because they do not believe that the relators and other hold-

ers of the bonds have any legal claim against the city, certainly has the merit of novelty as a defense. It will hardly be expected that we should spend time upon that."

Strong, J., in *Com. Ex rel. Hamilton v. Council of Pittsburgh*, 34 Pa. St., 496-54.

The ground that claimant has been overpaid by prior judgments in his favor, and that there was no real foundation for such judgments, perhaps "has the merit" of even greater "novelty as a defense."

VII.

The findings of the Court of Claims are like a special verdict, where a jury find the facts of the case, and refer the decision of the cause upon those facts to the court. So far as they go, the findings constitute "the evidence collected in the case in the Court of Claims."

The respondent claims that by the wording of the Act of February 17, 1903, the determination by him, "shall be upon the evidence in said cause, and not upon any findings, of the Court of Claims," which last "are absolutely immaterial to any issue involved herein * * * the said act *"resting in defendant the right to review said evidence, and make such findings as seem right and proper to him"* (Rec., 29). If the respondent had confined himself to the only question submitted to him, viz., "the amount saved by the undelivered ice," he might with some relevancy have termed the findings "immaterial," because on this one point there is no finding. But when he proceeds to retry questions already reduced to judgment, he is not at liberty to ignore findings by which he is concluded, and no power could have been given him to do so. The final judgment thereon precluded such emancipation from these findings. "The judgment having been rendered upon the finding of a referee"—here upon the more authoritative finding of a court—"is conclusive as to the facts

found, in all subsequent controversies between the parties on the contract."

Lumber Co. v. Buchtel, 101 U. S., 638.
Sugdam v. Williamson, 20 How., 432.
Stone v. United States, 164 U. S., 382.
U. S. v. Smith, 94 U. S., 218.
U. S. v. N. Y. Indians, 173 U. S., 470.
Stanley v. Supervisors, 121 U. S., 547.
Runkle v. Burnham, 153 U. S., 225.
Consolidated Canal Co. v. Mesa Canal Co., 177 U. S., 362.

VIII.

The Act of February 17, 1903.

What duties did it lay upon the Secretary of the Treasury?

It directed that

"the Secretary shall determine and ascertain the full amount which should have been paid to Parish & Company if the contract had been carried out in full, without change or default made by either of the parties thereto,"

(*a*) under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of United States *v.* Behan, 110 U. S., 338," and

(*b*) in accordance with the evidence in the case collected by the United States Court of Claims."

So, it was by the application of that "rule of the measure of damages," and upon the "evidence collected by the Court of Claims," that the Secretary was directed to ascertain, "the full amount which should have been paid to Parish & Co. if they carried out in full, without change or default made by either of the parties thereto."

The contract, as construed by the Supreme Court of the United States, in Parish *v.* U. S., 100 U. S., 500, was one

which required Parish to deliver ice, in certain quantities at certain prescribed points, for which the United States was bound to pay him certain fixed prices, as follows, viz.:

At St. Louis, 5,000 tons, at $16 per ton	$80,000
At Cairo, 5,000 tons, at $20 per ton	100,000
At Memphis, 10,000 tons, at $20 per ton	200,000
At Nashville, 10,000 tons, at $25 per ton	250,000
Total amount which should have been for 30,000 tons of ice	$630,000

It appears that the Committee (Rec., p. 21), after reciting the case of Parish *v.* United States, 100 U. S., 500, proceeded to say:

"In the case of the United States *v.* Behan (110 U. S., 338), which was decided four years later than the Parish case, and which is now the rule, the court laid down the rule as follows:

"The *prima facie* measure of damages for the breach of a contract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

And further on the report says:

"The reasons for the application of this more equitable rule in the Behan case were not nearly so clear and strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable."

By the expression "without default or change made *by either of the parties thereto*," Congress could not have intended to leave to the Secretary to ascertain which of the two parties to this contract was in default, because this court had already decided that the United States, and not Parish, was the party in default. In Parish *v.* United States, 100 U. S., 506, this court said:

"And as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

Congress, it must be conceded, then, intended to direct the Secretary to ascertain what amount Parish was entitled to recover, under the condition of the United States, being in default, in the fulfilment of the contract, on its part. Hence it was that the rule of damages laid down in the case of United States *v.* Behan, 110 U. S., 338, was prescribed to the Secretary as the rule that should govern him in the ascertainment of the balance due to Parish, under this contract. The court, in the Behan case, quotes from the opinion of the Court of Claims in that case, as follows:

"Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in default, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration."

The court said:

"We think that these views, as applied to the case in hand, are substantially correct."

And on page 346, it said:

"But, surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damages which the injured party has sustained."

The duty laid upon the Secretary by the act of February 17, 1903, was then to ascertain what amount Parish should receive under the contract which he was ready, able, and willing to carry out, but which he had been prevented from fully carrying out, by the action of the Government in suspending its further execution by the order of the Surgeon-General of March 31, 1863 (Record, p. 3).

The amount and the price of the ice delivered at each of the places specified were fixed in certain quantities.

That Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract, and the terms of the letter of March 25, 1863, but that the Government would not receive it, or more than 12,768 tons of it, are facts found by the Court of Claims.

That the evidence collected by the Court of Claims showed, without contradiction (Record, p. 4), what the cost of the delivery of the lost ice would have been, at the several points specified, appears in the record (Record, p. 10).

These are all the factors that could have possibly entered into the calculation of the amount yet due to Parish.

At no one of the steps or stages of such calculation was any room afforded for the exercise of any discretion, judicial or otherwise, on the part of the Secretary. The whole operation involved no more than a simple arithmetical calculation, and it will hardly be insisted that any mere mathe-

matical calculation, from the adding up of a column of figures to the solution of the most intricate problems in celestial mechanics, can involve the exercise of discretion.

The learned and accomplished Secretary in his finding or conclusion reached in the matter confided to him admits that—

"The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default and did refuse to receive, or at least suspended its order for 30,000 tons of ice" (Record, p. 33).

The Secretary had referred the whole matter to his subordinate official, the Auditor for the War Department, whose business it was, and for a long time had been, to make just such calculations. He was furnished with the act of Congress, and with all the records and papers relating to the subject. He took the evidence collected by the Court of Claims, and applying the rule of damages laid down in the Behan case, he reached a conclusion that there was due to Parish $181,358.95. The Secretary concluded his finding with the statement that—

"Counsel for claimant now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act.* I reach the conclusion that nothing is due."

If the amount ascertained by mathematical calculation is conceded to be correct and to be the amount due to the claimant, if anything is due, the grounds on which the Secretary reached the conclusion that nothing was due should be made clear. This has not been done.

We proceed on the basis that the duty laid on the Secretary did not clothe him with discretionary authority or power. He was not acting here as Secretary of the Treasury in the discharge of any official duty. None of the grave and important functions or duties of his high office were here called into exercise. He was discharging a mere

ministerial duty, which Congress might have laid upon any officer or employee of the Government, as it had frequently done before.

Almost every ground relied on by the Secretary to sustain the conclusion reached by him only serves to disclose the remarkable fact that the Secretary had not been advised of the decision by this court in Parish *v.* United States, 100 U. S., 500, and so had been led to find that many things did not exist, which this court, in that case, had solemnly adjudged did exist.

The Secretary, after stating (p. 34) that "The present controversy is confined to prospective profits on the undelivered ice," states that—

"It is in evidence that *the Government, after making demand upon Parish & Co., under its contract,* actually paid as high as $100 per ton for ice during that summer."

Now, surely, if there had been evidence in this case that the Government had made demand upon Parish & Co., under its contract, this court would not have decided as it did in the Parish case.

He says further—

"I consider it remarkable that Parish & Co. did allow ice purchased at points readily accessible by rail or water to spoil, *while declining to fill orders from the Government,* and in the face of a market value many times the contract price."

Nowhere has it been stated or suggested, far less proven, that the Government gave orders for ice to Parish, or that he had declined to fill them. On the contrary, Finding XI expressly states that after March 25, 1863, no such order was given (Record, p. 4).

He says further (page 35):

"Conceding that when a contract is countermanded the vendor is excused from tendering the subject of the sale, he certainly cannot recover without proof of ability to make de-

livery. * * * The evidence fails to show that at any time after March 25, 1863, Parish & Co. could have delivered the ice from Lake Pepin, had they sought to do so."

In Parish *v.* United States, 100 U. S., 50, this court said:

"As we have already stated, 12,768 tons were delivered and paid for; 10,000 tons perished by melting. What became of the 7,232 tons neither received by the Government nor lost at Lake Pepin is not disclosed by the record, nor whether claimants made by selling it to others or lost by it in that or any other way."

That case was decided in 1879. Parish then applied to Congress for payment, and showed to the committee what had become of the 7,232 tons of ice referred to in the opinion of the court, and on February 20, 1885, Congress enacted:

"That the Secretary of the Treasury be, and he is hereby directed to pay to Joseph W. Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were wholly lost to said Parish" (24 Stat., 653).

This appropriation by Congress in payment for the entire balance of the 30,000 tons of ice contracted to be furnished could not have been made, in the absence of proof that Parish was able to make delivery of the ice, under his contract.

The Secretary further says as to the recovery of profits:

"The claimant invokes the rule laid down in United States *v.* Behan, and that rule declares that profits cannot be recovered when 'incapable of that clear and direct proof which the law requires.' The Secretary of the Treasury is also directed in the act to confine his investigations to the evidence taken before the Court of Claims, and that evidence contains 'no clear and direct proof' as to the profits that might have been made had the ice been delivered."

Now it is manifest that "had the ice been delivered," the claimant would have been entitled to the contract price which covered all the profits to which he could have been entitled. The language of the Behan case, to which the Secretary refers, and from which he partially quotes, is as follows:

"They may be too remote and speculative in their character and therefore incapable of that clear and direct proof which the law requires, but when in the language of Chief Justice Nelson in the case of Masterton *v.* Mayor of Brooklyn, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection, they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation' " (United States *v.* Behan, 110 U. S., 344).

But it is evident that the cost of transportation of the ice from Lake Pepin was part of the evidence collected by the Court of Claims. It is set out in paragraph 16 of the petition (Record, p. 10). The specific charge in the petition is not met, but is evaded by the denial of defendant's answer (Record, p. 30). The charge is that "the record of that court shows that the proofs on that point were explicit," and it then recites the proofs. The answer does not deny this, but "denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered under the contract," &c.

But it does not deny that the evidence recited in the petition—the witnesses whose names and testimony are there given—was collected by the Court of Claims and does appear in the record of this case in that court. It could not have denied this. The Auditor of the War Department knew of, and was governed in his findings by this evidence. He could not have reached any conclusion without it. He found the cost of transportation to be $137,385.12.

Congress did not expect the Secretary of the Treasury to make the calculations called for by the act, personally and with his own hand. It was contemplated that he would employ the agencies at his disposal to do this work. He properly laid the burden on the shoulders of the Auditor of the War Department, and that official, guided throughout by the requirements of the act of Congress, did take the evidence collected by the Court of Claims and did apply to it the rule in the Behan case, and did reach the result shown on page 12 of this Record, and when the report of the Auditor was laid before the Secretary he "conceded" that the amount found by the Auditor was correct, but concluded that while that amount was due, if anything was, that nothing was due (Record, p. 37).

The grounds upon which he reached that conclusion are fairly and fully stated above, and it is too plain for dispute that they are not in conflict with the decision of this court in the case of Parish *v.* United States nor the case of United States *v.* Behan, nor in conflict with the facts ascertained by the committee of Congress, upon which it had appropriated the sum of $58,341.85.

IX.

A rule for the measure of damages which directs that in case of breach of contract the injured party shall receive from the defaulting party just what would have been received had there been no default is a perfectly plain rule which has no tendency to mislead anyone, and therefore did not mislead the auditor who stated the account. The rule is not one of novelty. Before the Behan case in this country and in England it had been laid down:

"Here is a clear rule that the amount that would have been received if the contract had been kept is the measure of damages if the contract is broken" (Alder v. Keightly, 15 M. & W., 117; *Hadley v. Boxendale,* 10 Exch., 341; *Benjamin v. Hilliard,* 23 How., 167).

The next excuse for non-compliance is, in effect, a sequel of the previous, viz, that the rule of the Behan case forbids the claimant's conclusion. The rule, it is said, "gives the measure of damages where default has been made. It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only where a vendee makes default, *if the contract is to be construed as though no default had been made.* The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default, and did *refuse to receive,* or at least suspended its order for 30,000 tons of ice" (*id.*). The rule thus criticised gives as the measure of profit "the difference between the cost of work and what he (in this case Parish) was to receive for it" (110 U. S., 345), *i. e.*, what *"should have been paid said J. W. Parish & Co. if the said contract had been carried out in full,"* &c. The imposition of the rule may be tautological, but is not contradictory. It is applicable not upon a "theory," but upon the adjudged fact "that the United States did make default," and did *not* "refuse to receive," but only "suspended" the order for the ice. The rule is a perspicuous one, and the incorporation thereof into the act raises no conflict of direction.

X.

Assertion of unspecified evidence, alleged to exist in contravention of proofs clearly presented in the petition, is assertion having no probative force. Such allegation, when made for the purpose of impairing the effect of existing judgments, would be irrelevant, even if the allegation could be proved and had been proved.

The respondent says (Record, p. 34):

"Parish & Co. claim that a portion of the ice purchased elsewhere than on Lake Pepin went to waste, and they claim prospective profits thereon. The ice purchased elsewhere than on Lake Pepin *was all available for transportation, and*

if it went to waste it was because of neglect. No language in the Behan case, or in any other case, will justify a vendor *in holding the subject of a rescinded sale, in the face of an advantageous market, until wasted or ruined by age, and then prosecuting an action for prospective profits.* I consider it *unthinkable* that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil *while declining to fill orders from the Government, and in the face of a market value many times the contract price.*"

The ample proof produced by Parish was, not that "a portion of the ice," but that all the undelivered ice "went to waste." Therefore the act of Congress of February 20, 1886, directed he should be paid "*the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for or taken by the Government, but were wholly lost to said Parish.*"

The language in 100 U. S., 506, is: "As the Government left the demand suspended, so that while claimants were compelled to purchase under the original orders, and *could not safely dispose of it (the ice), while it remained unrevoked, they are entitled to be paid for the ice which was lost.*" &c.

The vendor was justified in holding what was *not "the subject of a rescinded sale."* The order to deliver having been "suspended" only, he was bound by the obligation of contract so to hold it. To this obligation, the Law Board finds that he adhered: "The 8th finding of fact as to meltage and loss of ice at Lake Pepin, together with the declaration, contained in the act of Congress, approved February 20, 1886, that "all the ice not called for was wholly lost to said Parish," are based on sworn testimony" (*id.*, 13). There is no ground for the assertion that Parish ever declined to fill any order from the Government. The direct opposite is found by the Court of Claims, afterwards made binding by the judgment of this court, into which such finding is now merged.

Down to this point it should be plain that the refusal

to take action upon the obvious arithmetical result of the only question submitted is the avowed retrial of a judgment which went to execution in 1886. *The respondent declines to act in respect to what is referred to him, on the ground that former conclusions in respect to matters not referred to him are not "thinkable" by him.*

Finally, it will be seen from the record (No. 158 of October term, 1879) in *Parish v. United States*, 100 U. S., 500, that Thomas Simons, Assistant Attorney General, asked the Court of Claims to make the following additional finding:

"It does not appear that plaintiff made any effort to sell the undelivered 7,232 tons of ice, which had been purchased elsewhere than at Lake Pepin, and the market rates for ice at St. Louis and Chicago, after the 2d of April, 1863, are not shown to have been less than the prices named in the contract."

In the trial court Parish was blamed by the Government because he did not sell this ice; because he was faithful and not faithless to his contract. This was more than "thinkable." *The finding was made as requested.* The attempt to maintain that he obtained two prices for the ice which was lost, by first selling to others and then receiving from the Government reimbursement for the same, is a gratuitous aspersion, which should not have been insinuated by one who "*made a full and complete examination into the claim of Joseph W. Parish against the United States for balance, &c., and into the evidence in the case collected in the Court of Claims*" (Rec., p. 31). In the face of a market value many times the contract price, Parish "kept the faith."

The vendor, says the respondent, "certainly cannot recover without proof of ability to make delivery. For instance, Parish & Co. could not recover even the cost of ice purchased in Alaska to fill a contract subsequently *rescinded* without proving *that it was physically possible to deliver the ice from Alaska.* * * * The proof that they did try and failed is conclusive to my mind that it was impossible to

deliver the ice, and, if impossible, then prospective profits cannot be recovered" (*id.*, 35). The word *"rescinded"* was, of course, inadvertently used. The conclusion stated in the last sentence is derived from an alleged premise shown by the record to have no existence. Nott, J., in his dissenting opinion, said: "That this ice proved a total loss to the contractor, and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial."

12 Ct. of Claims, 622-624.

By a parity of reason, as this court has adjudged that Parish could recover the ice lost at Lake Pepin it has been adjudged "that it was physically possible to deliver it."

XI.

The distinction between profits which admit of "clear and direct proof" and profits which are "remote and speculative in character" in substance is the following: In the former case the gross result of the work under the contract is a sum fixed absolutely, and the cost of the work is able to be fixed (in the case at bar has been fixed) with something like certainty. In the latter case the gross result of the work is speculative, contingent, dependent upon the fluctuation of the market and the chances of business; so that the question of profit depends on a result which is problematical. This is too remote (Coosaw v. Mining Co., 75 F., 865).

When it is known with mathematical certainty what the gross result would be; and (save as to a single item of expense, with a certainty fixed by judgment what the cost of performance is; and the item remaining to be ascertained is established by uncontradicted proof, no element of the "speculative" or "precarious" is present to be considered.

The sixteenth paragraph of the petition gives the testi-

mony of a number of witnesses, among others that of *R. A. Scanlon, Government Superintendent of Transportation at the time,* showing the rates of transportation from Lake Pepin to St. Louis, Cairo, Nashville, and Memphis.

From Lake Pepin to St. Louis.....	$5.00 per ton
From Lake Pepin to Cairo.....	6.00 per ton
From Lake Pepin to Nashville.....	9.00 per ton
From Cairo to Memphis.....	2.00 per ton

The paragraph concludes:

"The foregoing testimony received no word of contradiction from the defendant. The evidence collected by the Court of Claims shows what would have been the price of transporting the non-delivered ice with such certainty that counsel for the Government in that court not only could not disprove, but could not deny it, and in effect admitted what they were unable to disprove. This branch of the claimant's case was therefore conclusively established" (*id.*, 10).

The answer to this paragraph does not deny a word of what is thus stated to be the uncontradicted testimony; does not dispute that it is "uncontradicted testimony."

The direction to be followed would seem to be a simple one. From the whole amount which would have been payable under the contract was to be deducted the whole cost of work. Saving the cost of transportation, the cost of work was known when the act of February 17, 1903, was passed. This cost of work had not been paid because this had not been incurred. After this had been deducted all that was needed to secure the correct deduction of the balance was to deduct the payments theretofore made. No discretion was given to deduct more or less. The following is the result:

Contract price		$630,000.00
Payments by Medical Department	$129,738.33	
Settlements by Second Comptroller	171,072.69	
Award by Court of Claims	10,444.91	
		311,255.93
		$318,744.07
As the cost of transportation had not been deducted in the first instance the auditor deducts it in the end		137,385.12
Leaving the balance due		$181,358.95

The account is stated, the Law Board says, "as if Parish had delivered the whole amount of ice and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice." (Rec., 12.)

XII.

When, as stated by the Law Board, "under the act of February 17, 1903, there is not a single question of fact to be determined other than the amount saved to the contractor by the non-delivered portion of the ice," all the other deductions directed by the act having been previously determined; so that, "after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition;" nothing is left for the exercise of judicial or other discretion. There is no right of private judgment as to the response to be given to a mathematical proposition.

The respondent does not attempt to dispute the mathematical result reported by the auditor. On the contrary he concedes it. The answer concludes: "Counsel for the claimants now ask $181,358.95, *which is the amount conceded to be due, if anything, under the act. I reach the conclusion*

that nothing was due." (Rec., p. 37.) If anything is due all is due. Parish is entitled to all or nothing. The respondent assumes the burden of showing that nothing is due as the one alternative to the admission that all is due.

If it be said the respondent has decided that by reason of inability to deliver the undelivered ice Parish could not have entitled himself to the contract price thereon, this is the reply.

The answer states that 7,232 tons were "*purchased at points readily accessible*" (Rec., p. 34). Unquestionably these could have been delivered. As to so much, therefore, the respondent cannot be heard to say, "nothing is due." His own answer is his confutation. As to the ice purchased at Lake Pepin, the respondent is concluded by judgment. In 100 U. S., 507, it is adjudged that Parish was entitled to be reimbursed "the cost of the ice purchased at Lake Pepin and lost." Reimbursement was adjudged by this court found due by the War Department and ordered to be made by Congress for ice which could have been delivered, not for ice which could not have been delivered. The determination of the power to deliver was necessary to the determination of the right to be paid. The proof was before this court in finding IX of the Court of Claims—"The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his contract."

In the absence of this decisive evidence the ability to deliver would be implied as an essential ingredient of the judgment which was entered. The proof of the fact is now merged in the judgment of this court and the legislation of Congress in pursuance thereof; in the executed judgments of the Legislative and Judicial Departments. It is no longer in the power of any of the Departments or of all of them together to reopen or revise these determinations in this issue between Parish and the Government.

It is exactly this which the respondent has undertaken to do. He has undertaken to revise and reverse the judgment

of this court and the legislation of Congress pursuant thereto, and after setting aside these judgments of more than twenty years' standing to adjudge (and in the teeth of his own showing as to 7,232 tons) that as the balance of the ice could not have been moved, therefore the balance of the contract price cannot be recovered therefor. He gives as a reason for making no examination on his own part of that which was referred to him that he has laboriously examined that which was not and could not have been referred to him.

As is shown by the supplement or addendum to the Record, filed herewith by stipulation of counsel, the Comptroller of the Currency, to whom the account was referred by the Secretary for re-examination, certifies that he finds "a debit difference of $181,358.95." The exact sum to a cent, found by the Auditor to be due to Parish, the Comptroller finds to be due by him: "the purpose of this certificate being," he states, "to eliminate the balance certified by the Auditor." There is only one possible way by which Parish could be brought in debt to the Government, viz., by previous over-payments to Parish. But the payments theretofore made were payments sanctioned by judgment of this court and legislative enactment in pursuance thereof. Therefore, the judgment of this court, and such legislative enactment, was reversed, first by the Comptroller, and afterwards by the Secretary, in order *"to eliminate the balance certified by the Auditor."*

XIII.

The reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of an act.

In the case of *Kendall v. The United States*, the court fortify their own construction of the act by what is said in a report of the judiciary committee of the Senate (12 Pet., 612).

In *ex parte Farley,* in construing an act making no provision for a grand jury, the court quoted from the report made by Mr. Culberson:

"As the court below is limited in its criminal jurisdiction to offenses below the grade of felony, no grand juries will be needed, and none are provided for."

It is added:

"This is the language of one of the lawmakers; the language of the gentleman, who, as chairman of the Judiciary Committee of the House, had charge of the bill in that branch of the lawmaking power. *The statements of those who had charge of the law, made to the legislative body passing it, as to its meaning and purpose, are always competent*" (40 F., 69).

"We find, therefore, that the title of the act, the evil to be remedied, the circumstances surrounding the appeal to Congress, *the reports of the committees of each house,* all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor" (Brewer, J., *in Holy Trinity Church v. U. S.*, 143 U. S., 464-5).

In a report by the Senate Committee on Commerce in 1897, the provision was suggested as designed, among other things, "to protect the consumer" (White, J., in *Butterfield v. Stranahan*, 192 U. S., 495).

"The exigencies which led to the passage of the act are graphically set forth in a petition, addressed by the Glasgow Corn Trade Association to the Marquis of Salisbury, and embodied in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives."

Brown, J., in *The Delaware*, 161 U. S., 472.

"The act assumes that Hickey owned a tract of land, from which some timber was cut, but does not specify it. It is competent to refer to the report of the committee, which accompanied the bill, with the documents as *prima facie* evidence on this point."

4 Opinions of Attorney General, 479.

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, yet it is also true that we have examined the reports of committees of either body with a view of determining the scope of statute of such reports," &c.

Binns *v.* United States, 194 U. S., 495.
Johnson *v.* So. Pacific Co., 196 U. S., 19.

As said, in 4 Wall., 435: "The intent of the legislature is the test." If there be a doubt about that intent, what better way to dispel it than by reference to the language used by the committees in reporting the bill? Such being the line of decision from *Kendall v. United States* to the present time, what is to be learned from this source of information?

The title of the act is—

"An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of *any balance found due*" (Rec., p. 17).

The Secretary was not invited to examine, still less to pay what had been already examined and already paid. Standing upon what had been done, as *pro tanto* a finality, he was exclusively directed to ascertain "the balance" which would be left from the contract price, and to pay that.

Turning next to the reports of the two Houses cotemporaneous with and part of the legislative procedure resulting in the act under consideration, we are left in no doubt whatever.

Thus, after stating: "The matter of quantity was quickly settled by the Assistant Surgeon General in the order to the contractors under date of March 25, 1863," it is added: "Thus in twenty days from its date, the contract became definite and determined as to amount, price, places, and time of delivery" (Rec., p. 18). Even if the respondent had been unassisted by the judgment of this court, he might have concluded from the above, the absence of all warrant for his suggestion, that there could be no recovery under the original

contract because that had "been changed by a letter bearing date of March 25, 1863" (*id.*, 33). The committees state: "Parish could not dispose of the ice he had purchased, on the requisition of the Assistant Surgeon General, because the order to purchase 30,000 tons was only *suspended.* * * * The contract terminated, and the balance of the ice melted away, and was a total loss" (*id.*, 19). Irrespective of the judgment of this court, the reading of these reports should have satisfied the respondent he had no warrant for the conclusion: "I consider it unthinkable that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil" (*id.*, 34), and to frame a return on such hypothesis.

Attention to these reports should have satisfied the respondent that he was not emancipated from the conclusions of these "findings"; that in all matters covered by them these findings were "the evidence in the case collected by the United States Court of Claims"; and that especially he could not disregard said finding IX, which is made the basis of the act of February 17, 1903, by holding that this act gave him authority to conclude "that it was impossible to deliver the ice" (*id.*, 35).

The report submits the following proposition:

"Congress having heretofore given *only partial justice* in this case, there is no question but it is authorized to do *complete justice to the claimant, as this bill and the law contemplates*" (*id.*, 22).

This certainly gives no sanction to the view, stated as a ground of action, "that the payments heretofore made to him (Parish) exceed the loss which he actually sustained" (*id.*, 50).

The report states with clearness the rule to be followed. It is, *"that the measure of damages for that part of the contract remaining unperformed at the time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay."*

The report shows why the application of the rule is practicable:

"In the latter case (the Parish case) *the contract expressly provided what should be paid for the ice delivered at the various places named. The profits therefore were readily and easily ascertainable*" (*id.*, 21).

The conviction of the committees which reported the bill is, therefore, utterly at war with the position taken by the respondent, viz., that the profits are "incapable of that clear and direct proof which the law requires" (*id.*, 37).

XIV.

When the object of a writ of mandamus is to invest the plaintiff with an office, there the contention that the action dies with the original claimant is pertinent. But when the action arises ex contractu for the recovery of money; and especially when the right of recovery has been reduced to what might be called legislative judgment or decree, there the action is brought in respect of a property right, and is governed by the rule for the survival of such right and cause of action.

The first reason alleged for non-compliance is that the rights claimed "were mere personal rights of Joseph W. Parish, and were not property which could pass under his will, or to his personal representatives."

The claim and right to recover arises under a contract by Henry Johnson for the United States, and by Joseph W. Parish and William L. Huse "for themselves, their heirs, executors and administrators" (Rec., p. 16). The act of February 17, 1903, was a legislative judgment directing the payment of the money due under this contract. Were the contract less explicit, the implication to the same effect would exist in the contractual obligation.

"The writ of mandamus in such cases as this does not retain its prerogative character, and this is really a civil proceeding to determine the rights of the parties in respect to property."

Miller, J., in *Washington, &c., Co. v. Kansas, &c., Co.*, 5 Dill., 480.

"This court has repeatedly held since Postmaster Kendall's case, 12 Pet., 524, that the proceeding in mandamus is, when appropriate, an action at law to recover money, and is subject to the principles which govern such actions."

Louis v. Brown Township, 100 U. S., 166.

In such a case the writ "becomes a substitute for the ordinary process of execution."

Strong, J., in *Supervisors v. Durant*, 9 Wall., 417.

"Mandamus, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment."

Harshman v. Knox County, 122 U. S., 318.

The right accruing under a statute like the one now before the court may be assigned, and the assignee may be relator in a mandamus proceeding long after the death of the assignor.

Roberts v. The United States, 176 U. S., 231.

In the case last cited, the claimant assigned his right to T. J. Fisher after the death of the claimant, and after Fisher's death the executors of Fisher assigned the claim to one Robinson, and still later he assigned the claim to the relator in the mandamus proceeding. If that relator could sustain the proceeding, it was only because the executors of Fisher could. If the executors of an assignee could sustain the proceeding in that case, surely the executors of the original claimant can in this.

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